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No. 00-1187

In the Supreme Court of the United States

DAVID R. MCKUNE, WARDEN, ET AL.,
PETITIONERS

v.

ROBERT G. LILE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination prevents a State from encouraging incarcerated sexual offenders to participate in a clinical rehabilitative program, in which participants must accept responsibility for their offenses, by conditioning the availability of certain institutional privileges on participation in the program.

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INTEREST OF THE UNITED STATES

The court of appeals in this case held that the Self Incrimination Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, prevents a State from seeking to advance legitimate penological objectives by conditioning the availability of certain institutional privileges on convicted sexual offenders' participation in a clinical rehabilitative program in which participants must accept responsibility for their sexual offenses. The Federal Bureau of Prisons (BOP), which operates more than 90 penal institutions across the country, has its own sexual offender treatment program. Like the state program challenged in this case, the overriding objective of the federal program is "to help sexual offenders manage their sexual deviance in

order to reduce sexual recidivism." U.S. Dep't of Justice, Bureau of Prisons, *Sex Offender Treatment Program* 1 (2001) (*Program Description*). As we explain below, although the federal program differs in important respects from the state program here, it shares the critical treatment goal of having inmates demonstrate "[c]omplete acceptance of responsibility for [their] sexual crime(s)." *Id.* at 2. The United States has a strong interest in establishing the validity of such treatment programs and, more generally, in ensuring that prison officials have appropriate discretion in seeking to advance legitimate penological goals such as reducing sexual recidivism.

STATEMENT

1. Sexual offenders inflict a terrible toll each year on this Nation and its citizens. In 1995, nearly 355,000 rapes and sexual assaults were reported nationwide by victims older than 12 years. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997); see also U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 24 (1999).[1] Between 1980 and 1994, the average number of individuals imprisoned for sexual offenses increased at a faster rate than that for any other category of violent crime. *Sex Offenses and Offenders* 18. In 1994, nearly 100,000 inmates were serving time in state prisons for rape or sexual assault; another 134,000 convicted sexual offenders were under community supervision, such as probation or parole. *Id.* at 15. More than 42,000 of those inmates victimized children. U.S. Dep't of Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* 2 (1996).

[1] These figures understate the incidence of sexual offenses because many sexual offenses go unreported and others involve children under the age of 12, who are not covered by this survey.

When they reenter society at large, convicted sexual offenders are much more likely to repeat the offense of conviction than any other type of felon. *Sex Offenses and Offenders* 27; U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* 6 (1997). At the same time, however, it is widely accepted by correctional officials and therapists alike that clinical rehabilitative programs can enable sexual offenders to manage their criminal sexual impulses and thereby reduce the risk of sexual recidivism. U.S. Dep't of Justice, Nat'l Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* xiii (1988) (*Practitioner's Guide*).[2] A vital component of those programs is for participants to come to terms with their sexual misconduct. *Id.* at 73.

2. a. Like most States and the federal government, Kansas has established a sexual abuse treatment program (SATP) for convicted sexual offenders as a means of enabling such inmates "to control deviant behavior and reduce [the risk of] reoffending" behavior. 4 Kansas Dep't of Corrections, *Offender Programs Evaluation* 31 (2000); J.A. 99. The Kansas SATP utilizes a number of generally accepted treatment techniques, including individual and group counseling, as well as polygraph and penile plethysmograph testing. See *Practitioner's Guide* 219-224 (discussing model treatment programs from more than 20 States). A critical treatment goal of the Kansas program—like that of virtually every other successful program—is for participants to accept

[2] "[T]he rate of recidivism of treated sexual offenders is fairly consistently estimated to be around 15%," whereas the rate of recidivism for untreated offenders has been estimated to be as high as 80%. *Practitioner's Guide* xiii. "Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals." *Ibid.*; see also, *e.g.*, *The Sexual Predator: Law, Policy, Evaluation and Treatment* 11-25 (Anita Schlank & Fred Cohen eds., 1999) ("[I]t seems generally recognized * * * that given an appropriate treatment regimen, many sexual offenders do respond positively.").

responsibility for their offenses. J.A. 100, 107. To that end, participants must complete an "Admission of Responsibility" form (J.A. 31), fill out a sexual history form discussing offending behavior (J.A. 32-34), and discuss their past sexual behavior in individual and group counseling sessions.

SATP staff generally keep such information confidential. However, inmates are informed before entering the program that confidentiality is limited. J.A. 35-36. In particular, SATP counselors must report any incidents of child abuse, as well as "situations which could be harmful to [the inmate] or others, or a threat to the orderly operation of the facility." J.A. 35. SATP staff also provide treatment evaluations of participants to the Kansas Parole Board, and SATP records may be subpoenaed. *Ibid.* We understand that no SATP participant has ever been charged with (or convicted of) a criminal offense based on information disclosed during treatment, but an inmate's participation in the program nonetheless could result in the disclosure of potentially incriminating information.[3]

b. Correctional officials recommend convicted sexual offenders who meet certain criteria for participation in the SATP. Those inmates are advised that the SATP is "voluntary," and that participants must sign a consent form before enrolling. J.A. 31; Pet. App. 20a. Nevertheless, prison officials encourage participation in the SATP, just like other prison programs, to advance their penological objectives. Pet. App. 27a; J.A. 100.

As an overall means of "managing the offender population and reinforcing constructive behavioral changes in offenders," the State's Internal Management Policy and Procedure (IMPP) for prisons establishes "a comprehensive system of earnable offender privileges," including those governing TV ownership, inmate organizations and activities, canteen expenditures, property, incentive pay, and visitation. J.A. 13-14. The IMPP establishes certain incentive levels—Intake Level, Level I, Level II, and Level III—that reward inmates who meet correctional goals by granting them additional privileges. J.A. 14-15, 27, 52. Although applicable regulations state that an "inmate shall not be penalized for refusal to participate in a formal program plan," Kan. Admin. Regs. § 44-5-105(c)(1), an inmate's decision not to participate in a recommended program, including the SATP, results in a reduction in his incentive level and, thus, in his privileges. J.A. 19, 73-74.

Declining to participate in the SATP may also affect where an inmate is housed. Kansas operates minimum, medium, and maximum security facilities. An inmate may not be housed in a facility with a security designation below his custody level, but may be housed in a facility with a security designation above that level. J.A. 60, 62; see J.A. 103-104 ("There are probably hundreds of medium security inmates today, and probably a good number of minimum security—or custody inmates, that are living in maximum security settings today."). Prison officials do not base housing decisions on the IMPP's incentive system, but instead rely, *inter alia*, on an inmate's custody level, the availability of space in a particular facility, and whether an inmate is enrolled in a program or has a job in a facility. J.A. 62-63, 68, 70-71, 99.

The SATP is conducted at only a few facilities in Kansas, including at the medium-security facility in Lansing. An inmate's refusal to participate in the SATP may result in his transfer from a facility that hosts the program to another facility, consistent with his custody level. J.A. 83. As the Secretary of Corrections has explained, "it makes no sense to have someone who's not participating in a program taking

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[3] Information about sexual offenses other than the offense of conviction may come up during counseling, but SATP staff do not view it as their role to "investigate" such offenses and, thus, try to use identifiers for prior victims other than their full names. J.A. 154; see J.A. 109-112, 154-155.

up a bed in a setting where someone else who may be willing to participate in a program could occupy that bed and participate in a program." J.A. 99.

3. In 1982, respondent flagged down a high school girl and forced her at gunpoint to commit oral sodomy on him, then drove her to a field and raped her. He was convicted of rape, aggravated sodomy, and aggravated kidnaping, and sentenced to life imprisonment with the possibility of parole after 15 years. *Kansas* v. *Lile*, 699 P.2d 456, 457 (Kan. 1985). Respondent was assigned a medium-custody level and imprisoned in the maximum-security facility in Lansing, along with other medium-custody inmates. In 1989, he was transferred to the medium-security facility in Lansing. In 1994, prison officials recommended that respondent participate in the SATP at that facility, but he declined to do so. Pet. App. 4a.

Under the IMPP, respondent's decision not to enroll in the SATP reduced his incentive level from Level III to Level I and, thus, diminished his privileges. Pet. App. 10a. At Level III, respondent could, *inter alia*, purchase his own personal TV; participate in approved organizations or activities; receive any approved visitor; and spend $140 per payroll period in the canteen. At Level I, he remains eligible for general TV viewing; may participate in certain self-help programs and enjoy library and religious services and gym and yard activities; may receive visits from immediate family members, attorneys, and clergy; and may spend up to $20 per payroll period. See J.A. 27 (chart).

Although he retained his medium-custody level, respondent received notice that he would be transferred from Lansing's medium-security facility—where the SATP is conducted—to its maximum-security facility, where he would be housed in the C-2 unit with other medium-custody inmates. Pet. App. 17a; J.A. 73. The conditions in C-2 are less favorable than those at the medium-security facility. For example, more inmates share a cell in C-2; it has inferior

athletic facilities; and C-2 inmates enjoy less flexibility than inmates in the medium-security facility, who, for example, have keys to their dormitory-style cells. J.A. 64-68; C.A. App. 47-48. In addition, respondent asserts that the potential for violence is greater in the C-2 unit, though prison officials dispute that contention. See J.A. 78-79.

4. In 1995, respondent filed this action, claiming that prison officials violated his Fifth Amendment privilege against compelled self-incrimination by reducing his privileges and noticing his transfer for not participating in the SATP.[4] The district court found that the SATP is a genuine "clinical rehabilitative program," supported by a "legitimate penological objective"—rehabilitation. Pet. App. 52a. In addition, the court acknowledged that respondent's refusal to participate in the program may not result in any "*atypical* [prison] hardship." *Id.* at 43a. Nonetheless, the court held that "the hardship attendant to [respondent's] refusal to participate in the SATP Program is sufficient compulsion for purposes of the Fifth Amendment," and granted summary judgment for respondent. *Id.* at 44a.

The court of appeals affirmed. Pet. App. 1a-32a. The court held that the consequences flowing from respondent's refusal to participate in the SATP "are sufficiently potent and substantial to constitute impermissible compulsion" under the Fifth Amendment. *Id.* at 26a. In so holding, the court reasoned that in the prison context unconstitutional "[c]ompulsion can be established by hardships that may not be atypical and that do not constitute enforceable liberty interests." *Id.* at 15a. Because it found impermissible com-

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[4] Respondent also claimed that the SATP violated his constitutional "right to privacy and bodily integrity" by requiring him to submit to a plethysmograph examination. Pet. App. 46a. The court of appeals did not consider the merits of that claim, and that issue is not before this Court. *Id.* at 32a.

pulsion, the court rejected the proposition that the SATP was "truly voluntary." *Id.* at 20a.

The court also considered respondent's claim under the inquiry established by *Turner* v. *Safley*, 482 U.S. 78 (1987). The court agreed with Kansas that the SATP served legitimate penological interests—"promoting rehabilitation and increasing public safety"—and recognized that requiring inmates to accept responsibility for their offenses advanced those interests, as "most mental health experts agree that 'a sex offender must admit his guilt for treatment and rehabilitation to be successful.'" Pet. App. 27a-28a. Nevertheless, the court concluded that "the *Turner* balancing weighs in favor of the inmate," reasoning that the State could achieve its objectives "by implementing a system of confidentiality or granting immunity." *Id.* at 32a.

SUMMARY OF ARGUMENT

Kansas encourages incarcerated sexual offenders to participate in a sexual abuse treatment program by conditioning the availability of certain privileges upon an inmate's agreement to participate. The program recognizes that successful treatment requires participants to come to terms with their past history of sexual misconduct. Although counselors seek that information to facilitate treatment, in some instances, counseling sessions may elicit information about past sexual history that indicates a current risk to the safety of children or other inmates. Kansas warns program participants that such information will not necessarily remain confidential. Nothing in the Self Incrimination Clause precludes Kansas from adopting, or encouraging inmates to participate in, this common-sense rehabilitative program.

The privilege against self-incrimination does not terminate with incarceration. Nonetheless, the fact of incarceration and the resulting restrictions on an inmate's liberty clearly inform the Fifth Amendment analysis. In the due

process context, this Court recognizes that the elimination of privileges and minor changes in incarceration status do not implicate constitutional liberty interests. *E.g.*, *Sandin* v. *Conner*, 515 U.S. 472 (1995). Those same principles support the proposition that, absent arbitrary state action, the minor changes in detention status at issue here do not result in unconstitutional compulsion. The court below reached a different conclusion by relying on cases that prohibit the government from penalizing the assertion of a Fifth Amendment privilege by loss of public employment or contracts. But this Court has never applied those so-called "penalty" cases in the prison context, and with good reason. The granting and withdrawing of privileges to which inmates have no entitlement does not create the same kind of compulsion as the penalties discussed in this Court's precedents. Moreover, the court of appeals lost sight of the basic point that what constitutes impermissible "compulsion" must take account of the significant restrictions already inherent in any sound penal regime.

Even if Kansas' treatment program implicates the Fifth Amendment rights of inmates, it does not violate the Constitution because any burdens on those rights are reasonably related to legitimate penological interests. See *Turner* v. *Safley*, 482 U.S. 78 (1987). Kansas' interest in reducing recidivism among convicted sexual offenders is unassailably legitimate. The treatment program advances that interest directly because it is almost universally acknowledged that accepting responsibility for past sexual misconduct is necessary for successful treatment. By providing incentives for inmates to participate, prison officials further the interests of other inmates, the facility, and society as a whole. Although not questioning those interests, the court of appeals held that the Kansas program was unconstitutional by reasoning that the State could achieve those objectives, without implicating inmates' constitutional rights, by the simple expedient of immunization. But decisions concerning the

scope of confidentiality in the prison rehabilitative setting are no less deserving of deference than other difficult judgments that correctional officials must make. Moreover, the limits that Kansas has placed on confidentiality, including those requiring counselors to report information concerning child abuse or the safety of inmates, clearly promote legitimate penological objectives.

Finally, if this Court concludes that the Kansas program is unconstitutional, it should do so on grounds that do not cast doubt on the validity of other treatment programs, including the federal program. Although there is almost universal agreement that acceptance of responsibility is key to successful treatment of sexual offenders, there are a variety of ways to contour such a treatment program. BOP has chosen not to condition the availability of privileges on inmates' agreement to participate in its treatment program. Even if the Court concludes that the Kansas program is invalid, it should leave room for the operation of a treatment program like the federal one.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT PREVENT A STATE FROM ADVANCING LEGITIMATE PENOLOGICAL OBJECTIVES BY CONDITIONING THE AVAILABILITY OF INSTITUTIONAL PRIVILEGES ON PARTICIPATION IN A REHABILITATION PROGRAM THAT REQUIRES CONVICTED SEXUAL OFFENDERS TO ACCEPT RESPONSIBILITY FOR THEIR OFFENSES

The Self Incrimination Clause of the Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." Because "[t]he Amendment speaks of compulsion," *United States* v. *Monia*, 317 U.S. 424, 427 (1943), this Court has emphasized that "[t]he constitutional guarantee is only that the witness be not *compelled*

to give self-incriminating testimony." *United States* v. *Washington*, 431 U.S. 181, 188 (1977); see *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 286 (1998). The overriding issue in this case is whether Kansas' decision to condition certain privileges on whether convicted sexual offenders avail themselves of the State's SATP creates impermissible compulsion within the meaning of the Fifth Amendment privilege. As we explain below, that question should be resolved in light of the settled principles governing the constitutional rights of those who have been lawfully committed to a correctional system.

A. The Determination Whether An Inmate Has Been "Compelled" To Incriminate Himself Should Take Into Account The Nature Of The Regime To Which He Has Been Committed

1. "[P]risoners do not shed all constitutional rights at the prison gate, but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Sandin* v. *Conner*, 515 U.S. 472, 485 (1995) (citation omitted); see *Shaw* v. *Murphy*, 121 S. Ct. 1475, 1479 (2001); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977). A broad range of conditions and choices that would infringe constitutional rights in free society fall within the "expected conditions of confinement" of those who have been lawfully convicted and incarcerated. *Sandin*, 515 U.S. at 487 n.11.

"The limitations on the exercise of constitutional rights [by inmates] arise both from the fact of incarceration and from valid penological objectives—including * * * rehabilitation of prisoners." *O'Lone*, 482 U.S. at 348; see *Bell* v. *Wolfish*, 441 U.S. 520, 546 (1979). Courts owe broad deference to the judgment of those who administer our Nation's penal institutions in determining how to promote such legiti-

mate penological objectives. See *Shaw* v. *Murphy*, 121 S. Ct. at 1480; *Lewis* v. *Casey*, 518 U.S. 343, 349-350 (1996). Moreover, when, as here, "a state penal system is involved, federal courts have * * * additional reason to accord deference to the appropriate prison authorities." *Turner* v. *Safley*, 482 U.S. 78, 85 (1987).

Those principles apply to the Fifth Amendment just as forcefully as they do with respect to the First Amendment and other cherished rights. To be sure, "[a] defendant does not lose [Fifth Amendment] protection by reason of his conviction of a crime." *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984). But, as this Court has recognized, lawful conviction and incarceration necessarily place limitations on the exercise of a defendant's Fifth Amendment privilege. See, *e.g.*, *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976). In *Baxter*, the Court declined to extend to prison disciplinary proceedings the rule of *Griffin* v. *California*, 380 U.S. 609 (1965), that the prosecution may not comment on a defendant's silence at trial. 425 U.S. at 319; see *id.* at 320. As the Court explained, "[d]isciplinary proceedings in state prisons * * * involve the correctional process and important state interests other than conviction for crime." *Id.* at 319.

2. a. The uniqueness of the prison environment informs the determination whether an individual has been "compelled" to act in a manner proscribed by the Fifth Amendment. As the Court explained most recently in *Sandin*, the "expected perimeters of the sentence imposed by a court of law" include a wide range of actions that may adversely affect an inmate's life within the penal system, without implicating any protected liberty interest. 515 U.S. at 485. For example, "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976). Accordingly, the fact "[t]hat life in one prison is much more disagreeable than in another" does not in itself give rise to any constitutional objection

"when a prisoner is transferred to the institution with the more severe rules." *Ibid.*

The same follows for any number of additional privileges or conditions affecting the "ordinary incidents of prison life," including the entitlement to particular types of food, recreational facilities, or jobs. See *Sandin*, 515 U.S. at 483. Indeed, in *Hewitt* v. *Helms*, 459 U.S. 460, 467 n.4 (1983), this Court concluded that an inmate's transfer to another facility did not in itself implicate a liberty interest, even though that transfer resulted in the loss of "access to vocational, educational, recreational, and rehabilitative programs." Short of the type of "atypical, significant deprivation in which a State might conceivably create a liberty interest," or "arbitrary state action," an inmate may be required to endure many deprivations without being denied any liberty interest. *Sandin*, 515 U.S. at 486-487 & n.11.

When, as an incidental consequence of a valid rehabilitative program, an inmate experiences nothing more than the type of deprivations or hardships that are within the expected conditions of his confinement, he has not been subjected to compulsion proscribed by the Fifth Amendment. One of the basic realities of incarceration is that prison officials may establish incentives for inmates to behave in a manner that advances legitimate penological goals, including rehabilitation. See *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974) ("[S]ince most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody.").

Prison officials may promote such behavior in numerous ways, including by linking the availability of institutional privileges in which inmates enjoy no liberty interest to whether inmates act in a manner that advances legitimate penological goals. Asking inmates to choose between forgoing such privileges, on the one hand, and enrolling in a clinical rehabilitative program that requires them to accept responsibility for their sexual offenses, on the other, does not

subject them to any pressure that is not already inherent in the regime to which they have been committed.

To be sure, forgoing institutional privileges may make prison life more difficult for inmates. But when that is the result of a choice that involves legitimate penological interests, it does not exert the compulsion necessary for a Fifth Amendment violation. Where a correctional program—rehabilitative or otherwise—does not advance a legitimate objective, but instead is simply a pretext for gathering incriminating evidence on inmates, a State could not deny inmates privileges for refusing to participate. But nothing in the Self Incrimination Clause prevents a State from establishing a valid rehabilitative program and encouraging inmates to participate in it by conditioning privileges in which they do not enjoy a liberty interest on their decision to enter the program.[5]

b. The loss of privileges experienced by respondent clearly did not implicate any protected liberty interest.[6] As discussed above, under the IMPP, the reduction in respon-

[5] The breadth of the reasoning that led the Tenth Circuit to a contrary conclusion invites Fifth Amendment challenges by inmates to virtually *any* effort by prison officials to allocate privileges or conditions, even incidentally, based on whether a prisoner has accepted responsibility for his offenses. For example, if the decision below is affirmed, prisoners can be expected to challenge the use of offense severity scores to assign prisoners to more restrictive facilities if (as in the federal system) offense levels take account of whether the prisoner accepted responsibility for the offense of conviction. Cf. Sentencing Guidelines § 3E1.1. Likewise, the Tenth Circuit's expansive rationale could lead to challenges to the routine imposition of rehabilitative treatment (whether for sexual offenders or substance abusers) as a condition of probation, parole, or supervised release. Cf., *e.g.*, 18 U.S.C. 3563(b)(9) (1994 & Supp. V 1999).

[6] Respondent has not argued, nor could he, that his decision not to participate in the SATP increased the sentence that he received for his crimes of rape, aggravated sodomy, and kidnaping. Moreover, respondent's decision not to participate in the SATP did not affect his eligibility for good-time credits or his eligibility for parole. See Pet. App. 10a-12a.

dent's incentive level diminished (but did not eliminate) his privilege to enjoy, *inter alia*, TV ownership, inmate activities, canteen expenditures, visitation, incentive pay, and intake property. See J.A. 27. Those are precisely the sort of "ordinary incidents of prison life" that, as this Court reaffirmed in *Sandin*, are not protected by the Due Process Clause. 515 U.S. at 483; see *Bankes* v. *Simmons*, 963 P.2d 412, 420 (Kan.) (reduction in privileges stemming from refusal to participate in the SATP or other program is "not atypical and do[es] not pose a significant hardship within a prison" and, thus, does "not involve a liberty interest"), cert. denied, 525 U.S. 1060 (1998). Accordingly, the loss of those privileges here does not create the degree of compulsion required to trigger the Self Incrimination Clause.

The same goes for the proposed change in respondent's housing. Indeed, that change is analogous to—and, if anything, *less* consequential than—the transfer challenged in *Meachum*, where this Court held that the Due Process Clause does not in itself protect an inmate from being transferred from a medium-security facility to a maximum-security facility with less favorable living conditions. 427 U.S. at 228-229.[7] As the Court explained, "[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all." *Id.* at 228. See *Sandin*, 515 U.S. at 486; *Hewitt*, 459 U.S. at 468.

[7] Respondent has asserted that the conditions in the C-2 unit would expose him to a "greater threat of personal harm." Opp. 2 (citing Pet. App. 18a). But prison officials have contradicted that contention. J.A. 78-79. Although the change in conditions does not appear any less favorable than the one involved in *Meachum*, if the Court concludes that that fact is material to the Fifth Amendment analysis in this case, it is genuinely disputed and should preclude summary judgment for respondent.

In sum, any pressure that was placed on respondent by the State's rules for encouraging inmates to participate in prison programs was entirely consistent with the nature of the regime to which he was lawfully committed, and did not rise to the level of compulsion proscribed by the Fifth Amendment.

3. The foregoing analysis establishes a clear and predictable regime for prison administrators seeking to encourage inmate participation in rehabilitative programs with acceptance-of-responsibility treatment goals, and builds on the framework that this Court has established for reviewing the constitutional claims of prisoners. Moreover, the Court's existing due process precedents not only provide a helpful baseline for evaluating claims of unconstitutional compulsion in the prison context, but also minimize the line-drawing problems that the Court sought to foreclose in *Sandin*. See 515 U.S. at 483-484.[8]

B. In Finding Unconstitutional Compulsion, The Court Of Appeals Misconstrued This Court's Precedents And Overlooked The History And Purpose Of The Privilege

1. In finding impermissible compulsion, the court of appeals relied upon "the so-called 'penalty' cases." *Minnesota* v. *Murphy*, 465 U.S. at 434; see Pet. App. 15a-16a. In

[8] If the loss of privileges in which inmates enjoy no liberty interest may amount to impermissible compulsion, then courts will certainly be called upon to decide which privileges are of constitutional magnitude. For example, it could not plausibly be argued that conditioning an inmate's privilege to receive "a tray lunch rather than a sack lunch" (*Sandin*, 515 U.S. at 483) on whether he agreed to participate in a sexual offender treatment program requiring acceptance of responsibility established unconstitutional compulsion. Presumably, the same could be said of the privilege to be housed in a cell with "electrical outlets for televisions." *Ibid.* But at some point, this Court would have to discover a limiting principle for deciding when impermissible compulsion arises due to the loss of such privileges.

those cases, the Court ruled that "the State could not constitutionally seek to compel testimony that had not been immunized by threats of serious economic reprisal," such as the termination of public "employment or eligibility to contract with the State." *Baxter*, 425 U.S. at 317. As the Court put it in *Garrity* v. *New Jersey*, 385 U.S. 493, 497 (1967), "[t]he option to lose [one's] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent."

Whatever the precise effect the fact of incarceration has on the scope of the Self Incrimination Clause, the court of appeals below erred in relying on the Court's penalty cases. This Court has never applied those cases to find a Fifth Amendment violation in the prison context, and with good reason. The penalty cases represent a significant extension of the protection against self-incrimination to preclude not only incrimination in a criminal case, but also being put to a choice between invoking the right and pursuing a livelihood or other important economic interests. Those principles are not easily extended to the prison context, where inmates already have surrendered their rights to pursue a livelihood and to contract freely with the State, as well as their liberty interests in many other basic freedoms.

In addition, there is no indication in this Court's decisions that the state provisions invalidated in the penalty cases were supported by a government interest other than obtaining potentially incriminating information from public employees or contractors. Here, by contrast, the correctional program is directly related to legitimate government objectives, including the rehabilitation of those who have been lawfully committed to its custody. "The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Baltimore City Dep't of Soc. Servs.* v. *Bouknight*, 493 U.S. 549,

556 (1990) (citing cases). That the regulatory program challenged in this case is amply supported by such purposes provides an additional reason to uphold it.

The penalty cases likewise must be considered in light of this Court's precedents recognizing that criminal defendants confront numerous difficult choices from investigation to conviction and release that do not create unconstitutional pressures. See, *e.g.*, *Woodard*, 523 U.S. at 287; *United States* v. *Mezzanatto*, 513 U.S. 196 (1995); *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *Brady* v. *United States*, 397 U.S. 742 (1970). Those cases establish that the Constitution allows the State to ask defendants and inmates to choose between exercising a constitutional right and forgoing that right in exchange for a hope or promise of some benefit. To the extent that the penalty cases invalidate such choices when imposed as generic conditions in particular civil contexts, different considerations apply in the criminal justice system.[9]

Moreover, the penalty cases involved choices that were different in both kind and degree from the choice presented to respondent here—a reduction in privileges governing matters such as TV ownership or recreational activities and transfer to less favorable though still more than adequate housing. Cf., *e.g.*, *Garrity*, 385 U.S. at 497 ("The choice given petitioners was either to forfeit their jobs or to incriminate

[9] In the prison context, correctional officials may present inmates with choices that require them to weigh the continued enjoyment of certain privileges against the perceived disadvantages of submitting to a valid treatment program, even when that program incidentally may require the inmate to disclose potentially incriminating information. That a program requires an inmate to weigh the benefit of *retaining existing privileges* as opposed to the benefit of *obtaining new privileges* is not a difference of constitutional dimension. The constitutionality of Kansas' program should not turn on whether it moves inmates who agree to participate from Level I to Level III, or moves those who decline to participate from Level III to Level I.

themselves."); *Spevack* v. *Klein*, 385 U.S. 511, 516 (1967) ("[T]hreat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion."). Thus, even if the prison context did not make any difference in this case, the penalty cases would still be inapposite.

2. Likewise, nothing in the history of the Fifth Amendment indicates that the privilege against compulsory self-incrimination was intended to proscribe the type of choice presented to respondent. "Historically, the [Fifth Amendment] privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's mouth. The Court has thought the privilege necessary to prevent any 'recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'" *Couch* v. *United States*, 409 U.S. 322, 327 (1973) (citation omitted); see Leonard W. Levy, *Origins of the Fifth Amendment* 328 (1968) ("The element of compulsion or involuntariness was always an essential ingredient of the right [against self-incrimination].").[10]

Justice Frankfurter observed for the Court that "[t]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" *Ullmann* v. *United States*, 350 U.S. 422,

[10] The penalty decisions have been criticized for stretching the Fifth Amendment privilege beyond its historical moors. As Judge Friendly observed, "[n]othing in the historical development of the [Fifth Amendment] privilege suggests that threatened loss of employment was the kind of compulsion against which the amendment aimed to protect." Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 707 (1968); see *id.* at 708 & n.158; see also, *e.g.*, Leonard W. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* 208 (1986). As noted above, finding unconstitutional compulsion in this case would require extending the Fifth Amendment privilege even further beyond its original design.

438 (1956). Asking inmates to choose between certain institutional privileges and participation in a rehabilitative program requiring acceptance of responsibility does not subject inmates to an "inquisition," or even the "cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). To the extent that an inmate fears that participation may result in self-incrimination, he may simply decline to participate. While it may make the conditions of his confinement less comfortable, that decision has no incriminating effect whatever.

C. Even If The Kansas SATP Implicates Inmates' Fifth Amendment Rights, It Reasonably Advances Legitimate Penological Goals And Therefore Is Valid Under *Turner*

Even if Kansas' treatment program implicates respondent's Fifth Amendment rights, the SATP is nonetheless constitutional under *Turner*. As the court of appeals recognized, a finding of constitutionally impermissible compulsion begins rather than ends the constitutional analysis. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. As the Court underscored just last Term, "under *Turner* and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management." *Shaw* v. *Murphy*, 121 S. Ct. at 1480.

Turner identifies several potentially relevant factors in determining whether a prison regulation implicating prisoners' constitutional rights furthers legitimate penological goals, including the extent to which the regulation has a rational connection to the State's legitimate interests, and the existence of ready and reasonable alternatives. 482 U.S. at 89-90. To the extent that those factors are relevant to a self-incrimination claim, they point decidedly to the constitutionality of Kansas' SATP.[11] The Tenth Circuit's contrary conclusion is based on a fundamental misapplication of *Turner*.

1. Kansas' program furthers the indisputably legitimate goal of reducing recidivism among convicted sexual offenders. Rehabilitation is a "paramount objective" of any penal system. *Pell*, 417 U.S. at 823; see *Sandin*, 515 U.S. at 485; *O'Lone*, 482 U.S. at 348; Pet. App. 28a. Respondent does not deny that the SATP is a genuine "clinical rehabilitative program." *Id.* at 52a. As discussed above, that program utilizes generally accepted treatment techniques for sexual offenders, and has as its primary objective reducing sexual recidivism among such offenders. See p. 3, *supra*; J.A. 99-100. What is more, the available statistics indicate that the Kansas program actually has succeeded in promoting that objective. 4 *Offender Programs Evaluation* 34 (discussing reduction in sexual recidivism among inmates receiving treatment compared with those who eschewed it).

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[11] In *Turner*, this Court also identified as relevant considerations the availability of alternative means to exercise the constitutional right, and the impact of the regulation on guards, other inmates, and the allocation of prison resources generally. See 482 U.S. at 90. Although the former factor may be instructive in a First Amendment case like *Turner*, we do not believe that it affects the analysis of respondent's Fifth Amendment claim. While the First Amendment makes the existence of alternative channels of communications constitutionally relevant, see, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 797 (1989), there is no analogous Fifth Amendment doctrine. With respect to the latter factor, everyone in the prison environment—including inmates, guards, and other prison officials—benefits from encouraging sexual offenders to receive treatment that may enable them to control their sexual impulses. Sexual offenses *within* prison remain a serious problem in the Nation's penal institutions. In addition, to the extent that information disclosed during the program may be used to prevent inmates from abusing one another or guards, that consideration only bolsters the constitutionality of the Kansas program under *Turner*. See p. 26, *infra*.

At the same time, no one disputes that acceptance of responsibility is a critical component of sexual offender treatment programs. See Pet. App. 28a-29a; *Practitioner's Guide* 73; J.A. 100, 107. As one commentator has explained: "Without acceptance of responsibility, the key goals of treatment are stymied. Denial precludes addressing cognitive distortions, developing empathy for victims, identifying risk factors that may serve as warning signals, developing much needed social skills, and examining deviant sexual arousal." Stefan J. Padfield, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. Kan. L. Rev. 487, 498 (2001).

Respondent has not argued that the Kansas SATP and, in particular, its acceptance-of-responsibility goal are merely subterfuges for gathering incriminating evidence with respect to either the offense of conviction or prior sexual offenses. Cf. *Ferguson* v. *City of Charleston*, 121 S. Ct. 1281, 1291 (2001); *Minnesota* v. *Murphy*, 465 U.S. at 423 n.2. That argument would not be plausible in any event. No inmate has been charged with any offense based on information disclosed during treatment and, although information about other offenses may be disclosed, SATP staff do not "investigate" such offenses during treatment sessions. See p. 4, *supra*. To be sure, treatment presents the *potential* for eliciting information that may implicate criminal activity, but that potential incidental effect does not in itself render the entire program illegitimate.[12]

In addition, the deprivations about which respondent complains directly promote the State's legitimate penological objective of reducing sexual recidivism. Not every convicted sexual offender welcomes treatment. Because denial is a

[12] To the extent that the program were in fact abused by the State as a subterfuge for investigating criminal offenses, an inmate could challenge the use of any incriminating information obtained as a result of that abuse. Cf. *Bouknight*, 493 U.S. at 561-562.

common obstacle to seeking rehabilitative treatment, prison officials must be free to create incentives for convicted sexual offenders to participate in such treatment programs. Indeed, if it were not for the incidental effects of participation on asserted Fifth Amendment interests, nothing in the Constitution would even arguably prevent a State from directing inmates to participate in a valid rehabilitative program. Extending or withholding the type of privileges at issue in this case to provide an incentive for participation in the SATP strikes an appropriate balance between the inmate's interest in avoiding self-incrimination and society's interest in fostering rehabilitation.[13]

Providing more favorable housing to inmates who agree to participate in such programs is also an appropriate incentive. That is especially true when, as here, the differences in housing reflect incidental differences between the treatment facility and other facilities, and when housing changes allow additional inmates to receive rehabilitative treatment declined by others. See J.A. 99.[14]

[13] Indeed, in our view, programs that involved substantially greater incentives would nonetheless strike a constitutional balance. For example, the Fifth Amendment privilege should not pose an obstacle to a program that conditions early release or parole on participation in a sexual treatment program similar to Kansas' SATP. *A fortiori*, encouraging participation in a treatment program within the prison walls is constitutional.

[14] The court of appeals objected to the "automaticity" of the change in institutional privileges resulting from respondent's decision not to participate in the SATP. Pet. App. 25a. Although this Court has relied upon the fact that a consequence did not automatically follow from a decision to invoke the Fifth Amendment privilege as a reason for finding no compulsion, *e.g.*, *Minnesota* v. *Murphy*, 465 U.S. at 438, it has never held that the "automaticity" of a consequence is in itself a basis for finding compulsion, and this case would be a singularly inappropriate vehicle for doing so. In the prison context in particular, prison officials and inmates alike benefit from clear guidelines establishing the consequences flowing from an inmate's decision to behave in a particular fashion.

2. The absence of ready and reasonable alternatives for reducing recidivism among convicted sexual offenders bolsters the constitutionality of the SATP under the *Turner* analysis. Instead of considering the availability of alternative treatments, the Tenth Circuit seized upon the alternative of simply immunizing any statements made during treatment. *Id.* at 30a. That analysis is flawed on three levels: it takes all self-incrimination claims outside of *Turner*; it denies deference to prison officials in advancing legitimate penological goals; and it ignores that the program's confidentiality limits themselves are reasonably tailored to legitimate penological goals.

The most fundamental problem with the Tenth Circuit's analysis is that it would ensure that the government could never satisfy the reasonable-alternatives prong of the *Turner* analysis in a case that implicated a prisoner's interests in avoiding self-incrimination. Immunization is always an alternative, at least in theory, to giving an inmate the choice between forgoing a potential benefit and participating in a rehabilitative program that incidentally may elicit potentially incriminating statements. The Tenth Circuit described immunization as the "obvious, easy alternative" and "one that has been contemplated by the Supreme Court since the very inception of the Fifth Amendment right against self-incrimination." Pet. App. 30a. In light of this supposedly "obvious, easy alternative," the Tenth Circuit discounted Kansas' penological interests and concluded that this "factor weighs heavily in favor of [respondent]." *Id.* at 31a. But that proves too much. It effectively holds that whenever a prison regulation implicates a prisoner's self-incrimination right, the government must offer complete immunity to avoid a constitutional violation. *Turner* stands for the opposite proposition—that prison regulations do not violate the Constitution simply because they implicate constitutional rights.

The Tenth Circuit's singular focus on the possibility of immunization deprived prison officials of the deference that they are due under *Turner*. The Tenth Circuit was so convinced of the sensibility of granting immunity that it nakedly substituted its judgment for that of the relevant state officials, stating: "We are inclined to believe that prisons may better accomplish their goal of rehabilitation if they encourage inmates to admit their sex offenses by granting immunity or making statements privileged." Pet. App. 30a. But decisions concerning whether to immunize prisoner statements and the scope of confidentiality or immunity are precisely the kind of decisions that state officials, rather than federal courts, should be making. Although immunization is always an option in theory, it is not always a realistic or desirable option in practice. If officials must choose between immunizing incriminating statements concerning child abuse and offering effective treatment, treatment goals may suffer. That is not to say courts should ignore the possibility of offering immunity in the *Turner* analysis. But government decisions as to the scope of confidentiality and immunization, no less than other decisions that implicate constitutional interests, should be accorded deference.

The Tenth Circuit's analysis ignored the substantial confidentiality provided inmates under the SATP, and that the limitations on that confidentiality are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 88. The SATP broadly grants participants confidentiality for statements made during treatment. That broad grant of confidentiality has three principal limits. Participants are warned at the outset that statements will not remain confidential to the extent they involve child abuse, "situations which could be harmful to [the inmate] or others, or a threat to the orderly operation of the facility." J.A. 35. BOP's own treatment program has three parallel exceptions to confidentiality. See p. 27, *infra*.

Those exceptions clearly further legitimate penological and public safety interests. To begin with, the State manifestly has an overwhelming interest in preventing and redressing the sexual abuse of children and, accordingly, numerous States and the federal government make an exception to patient-therapist privileges for information relating to child abuse. See *Jaffee* v. *Redmond*, 518 U.S. 1, 34 (1996) (Scalia, J., dissenting) (listing state laws); see also 42 C.F.R. 2.22(b)(4) (establishing similar exception for federally assisted drug and alcohol counseling programs).

Prison officials have an equally obvious interest in redressing threats to individuals within the prison system, such as ongoing sexual abuse of other inmates. Indeed, protecting "institutional security and safety" is within the heartland of legitimate penological concerns. *Turner*, 482 U.S. at 93. BOP's treatment program recognizes that and places similar limits on confidentiality, see p. 27, *infra*, as do other federal counseling programs. See 42 C.F.R. 2.22(b) (information about commission of crimes on premises or against individuals involved in program must be reported). When "[o]ther well-run prison systems, including [BOP], have concluded that substantially similar restrictions on [confidentiality] were necessary to protect institutional order and security," it is clear that blanket immunization is not a ready or reasonable alternative. *Turner*, 482 U.S. at 93.

D. If The Court Concludes That The Kansas SATP Violates The Fifth Amendment, It Should Be Careful To Avoid Casting Doubt On The Validity Of Other Treatment Programs

If this Court concludes that the Kansas SATP violates respondent's Fifth Amendment rights, we urge it to avoid casting doubt on the validity of other sexual offender treatment programs, including the federal program, which may differ in material respects from the program at issue here.

BOP's program is conducted at a single facility in Butner, North Carolina and has only 112 spaces. The program "adheres to the notion that * * * criminal sexual behavior can be effectively managed in most cases through competent treatment and intensive supervision." *Program Description* 1. "[E]ach program participant is expected to * * * [demonstrate] [c]omplete acceptance of responsibility for [his] sexual crime(s)." *Id.* at 2. The "confidentiality [of disclosures] is protected at all times, except in cases where there is potential harm to self or others, when the security of the correctional institution is threatened, or when there is suspected child abuse." *Id.* at 3. Inmates are advised of those limits at the outset, and inmates who choose to participate in the program must agree to them in writing.

BOP does not condition the availability of institutional privileges on participation in its treatment program, in which there are only a limited number of spaces. Inmates must "volunteer for participation in the treatment program and demonstrate a commitment to behavioral change." *Program Description* 3. In addition, BOP seeks only "the most motivated and psychologically suitable offenders" for treatment. *Id.* at 1. "[F]ailure to achieve treatment goals may result in programmatic probation or immediate expulsion," which may in turn result in the inmate's transfer to his "parent facility." *Id.* at 3, 4.

Even under the expansive reasoning of the court of appeals, there is no basis for concluding that the possibility of such a transfer exerts impermissible compulsion within the meaning of the Fifth Amendment. No loss of institutional privileges flows from an inmate's decision not to participate in the program. Moreover, the federal goal of reducing sexual recidivism is undeniably legitimate and directly promoted by offering this type of treatment to convicted sexual offenders. In short, the federal program is clearly constitutional under the Fifth Amendment and *Turner*.

* * * * *

Studies increasingly indicate that rehabilitative programs that promote acceptance of responsibility may enable sexual offenders to manage their criminal sexual impulses and thereby reduce sexual recidivism. The Court should leave correctional officials with the leeway that the Constitution and our laws afford them to develop and encourage inmate participation in such commendable treatment efforts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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